RE YEOW CHOW BENG

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL JC
[PROBATE NO: 32-8-97]
5 JANUARY 1998

CIVIL PROCEDURE: *Administration of estates - Application for grant of probate - Procedure to be taken when a will executed later is discovered - Effect of entry of caveat - Rules of the High Court 1980, O. 71, O. 72*

SUCCESSION: *Probate - Validity of will - Discovery of will executed later - Effect of entry of caveat - Rules of the High Court 1980, O. 71, O. 72*

The applicants Ye Sie Eng and Yeoh Hoon Siong (hereinafter 'the petitioners') filed a petition for probate of the estate of one Yeow Chow Beng ('the testator') on 31 January 1997. The petitioners were the executors and trustees of the testator's will dated 24 April 1995. On 12 June 1997, one Yeow Ho Huat ('the caveator') entered a caveat in the Registry of the High Court under O. 71 r. 37 of the Rules of the High Court 1980 ('the RHC') against the issue of a grant in the petitioners' favour on the ground that he was a beneficiary and trustee under the last will and testament of the testator executed on 10 September 1995. The effect of the caveat was to ensure that no grant of probate or administration would be made without prior notice to the caveator.

As a result of the caveat, the petitioners issued a warning in Form 174 as provided in O. 71 r. 37(8) of the RHC. The caveator then entered appearance in Form 175 as prescribed by O. 71 r. 37(10) of the RHC. As Form 175 did not require the caveator to state particulars of his interest, the court adjourned the hearing of the matter to enable the caveator to refile his appearance incorporating the necessary particulars. The issue before the court was whether the petition could be heard summarily or should proceed as a contested matter.

Held:

[1] Upon appearance being entered in answer to a warning, the matter is deemed to be contested by virtue of O. 71 r. 37(14) of the RHC. As such, the court is obliged to either dispose of it summarily or direct that it proceed as a contentious probate proceeding under O. 72 thereof.

[2] As the appearance entered by the caveator showed that he had in his possession a will dated later in time than that of the petitioners', the the matter could not be disposed of summarily. The validity of the earlier will could only be determined in a probate action and as such, the matter should proceed under O. 72 of the RHC as a contentious probate proceeding.

[3] The probate action under O. 72 of the RHC was to be commenced by the petitioners as they were the ones applying for probate.

Obiter dictum:

[1] The caveator could not be faulted for failing to give particulars of his interest as he had merely filled in the particulars required by Form 175. It was Form 175 which should be modified as authorised by O. 1 r. 7 of the RHC to incorporate the requirements of O. 71 r. 37(10) thereof.

[Petition ordered to proceed as a contentious probate proceeding.]

Legislation referred to:
Rules of the High Court 1980, O. 1 r. 7, O. 71 rr. 37(8), (10), (14), 38, O. 72

For the petitioners - Ravinathan Muthiah; M/s Ravi Muthiah & Co
For the caveator - Ng Kong Peng; M/s KP Ng & Amardas

Reported by Anne Khoo

JUDGMENT

Augustine Paul JC:

Ye Sie Eng and Yeoh Hoon Siong ('the petitioners') filed a petition for probate of the estate of Yeow Chow Beng, deceased ('the testator') on 31 January 1997. The testator had died on 5 August 1996 after having executed a will on 24 April 1995 with the petitioners as his executrixes and trustees. The petition was supported by one of the attesting witnesses, Sekar s/o Palaniandy, advocate and solicitor, who deposed to the due execution of the will. On 12 June 1997 one Yeow Ho Huat ('the caveator') entered a caveat against the issue of the grant in favour of the petitioners on the ground that he is a beneficiary and trustee under the last will and testament of the testator executed on 10 September 1995.

A caveat is entered by a person to ensure that no grant is made without notice to himself. The entry of a caveat and the procedure to be followed after its entry is governed by O. 71 r. 37 of the Rules of the High Court 1980 which reads as follows:

(1) Any person who wishes to ensure that no grant is made without notice to himself may enter a caveat.

(2) When a caveat is entered, the Registrar must forward a copy of the caveat and give notice in Form 167 to the Registrar of the Principal Registry.

(3) Any person who wishes to enter a caveat (in this rule called "the caveator") may do so by filing the caveat in Form 173 in the Registry and obtaining an acknowledgement of entry from the proper officer, or by sending through the post at his own risk the caveat to the Registry.

(4) Where the caveat is entered by a solicitor on the caveator's behalf, the name of the caveator must be stated.

(5) Except as otherwise provided by this rule, a caveat shall remain in force for 6 months from the date on which it is entered and shall then cease to have effect, without prejudice to the entry of a further caveat or caveats.

(6) The Registrar of the Principal Registry shall maintain an index of caveats entered in all Registries and on receiving a notice of an application for a grant made in any Registry or to a Collector he shall cause the index to be searched and shall notify the appropriate Registrar or Collector in the event of a caveat having been entered against the sealing of a grant for which application has been made in the Registry or to the Collector.

(7) The Registrar must not make any grant if he has knowledge of an effective caveat in respect thereof:
Provided that no caveat shall operate to prevent the making of a grant on the day on which the caveat is filed.

(8) A caveat may be warned by the issue from Registry of a warning in Form 174 at the instance of any person interested and, if he claims under a will, the date of the will, and must require the caveator to give particulars of any contrary interest which he may have in the estate of the deceased; and every warning or a copy thereof must be served on the caveator and the Registrar of the Principal Registry.

(9) A caveator who has not entered an appearance in Form 175 to a warning may at any time withdraw his caveat by giving notice at the Registry and serving a copy of it on the Registrar of the Principal Registry and the caveat shall thereupon cease to have effect and, if he has been warned, the caveator must give notice of withdrawal of the caveat to the person warning.

(10) A caveator having an interest contrary to that of the person warning may, within 8 days of service of the warning upon him inclusive of the day of such service, or at any time thereafter if no affidavit has been filed under paragraph (12), enter an appearance in Form 175 in the Registry, and must serve on the person warning and the Registrar of the Principal Registry a copy of it sealed with the seal of the Court.

(11) A caveator having no interest contrary to that of the person warning but wishing to show cause against the making of a grant to that person may within 8 days of service of the warning upon him inclusive of the day of such service, or at any time thereafter if no affidavit has been filed under paragraph (12), issue and serve a summons for directions, which must be returnable before the Registrar.

(12) If the time limited for appearance in Form 175 has expired and the caveator has not entered an appearance, the person warning may file in the Registry an affidavit showing that the warning was duly served and that he has not received a summons for directions under paragraph (11), and thereupon the caveat shall cease to have effect.

(13) Except with leave of the Registrar, no further caveat may be entered by or on behalf of any caveator whose caveat has ceased to have effect under paragraph (12) or rule 40.

(14) Upon an appearance being entered in answer to the warning of a caveat, the matter shall be deemed to be contested and the expenses of entry of such caveat and the warning thereof shall be considered as costs in the cause.

(15) In this rule "grant" includes a grant by any court outside Malaysia which is produced for resealing by the High Court.

The next step after the entry of a caveat as provided by O. 71 r. 37(8) is the issue of a warning in Form 174 at the instance of any person interested stating his interest and, if he claims under a will, the date of the will, and must require the caveator to give particulars of any contrary interest which he may have in the estate of the deceased. The petitioners duly issued a warning. The material parts of it read as follows:

Kepada YEOW HO HUAT beralamat di no 103 Jalan Tun Tan Cheng Lock ,75200 Melaka, satu pihak yang memasukkan kaveat dalam harta pusaka YEOW CHOW BENG, si mati.

Kamu adalah dengan ini diberi amaran, dalam masa 14 hari selepas penyampaian ini ke atas kamu, termasuk hari penyampaian:

(1) untuk memfailkan satu notis kehadiran dalam Borang 175 sama ada secara sendiri atau melalui peguamcara kamu di Pejabat Pendaftaran Mahkamah Tinggi, dengan membentangkan apakah kepentingan yang kamu ada dalam harta pusaka YEOW CHOW BENG, si mati yang dinamakan di atas, yang bertegangan dengan kepentingan pihak yang atas permintaanya amaran ini dikeluarkan; atau

(2) jika kamu tidak mempunyai kepentingan yang bertentangan tetapi ingin menunjukkan sebab terhadap pemeteraian geran kepada pihak itu, untuk mengeluarkan dan menyampaikan saman meminta arahan daripada Pendaftar.

Dan ambil perhatian bahawa jika kamu ingkar berbuat demikian, Mahkamah boleh bertindak untuk mengeluarkan suatu geran probet atau kuasa mentadbir bagi harta pusaka tersebut tanpa mengambil kira kaveat kamu.

The warning was followed by the entry of an appearance by the caveator pursuant to O. 71 r. 37(10) which provides, *inter alia*, that a caveator having an interest contrary to that of the person warning may, within eight days of service of the warning upon him inclusive of the day of such service enter an appearance in Form 175. I consider it necessary to reproduce Form 175.

No. 175

APPERANCE TO WARNING OR CITATION

(Title as in Form 168)

Caveat No ... dated the ... day of ... 19 ... (or Citation dated the ... day of ..., 19 ...).

Full name and address of deceased ...

Full name and address of person warning (or citor) ...

...

Full name and address of caveator (or person cited) ...

...

Enter appearance for the abovenamed caveator (or person cited) in this matter.

Dated the ... day of ..., 19 ...

...

Solicitors for the ...

The address for service is ...

The appearance entered by the caveator was in accordance with the strict requirements of Form 175. It is significant to note that upon an appearance being entered in answer to the warning of a caveat the matter shall be deemed to be contested (see O. 71 r. 37(14)). In that event the procedure laid down in O. 71 r. 38 must be followed. The rule reads as follows:

38(1) Every contested matters must be referred to a judge who may dispose of the matter in dispute in a summary manner or direct that the provisions of O. 72 shall apply.

(2) Where a matter is directed to be disposed of summarily the petition (if any) shall ordinarily be adjourned into open court for hearing and the court may on such adjourned hearing either grant or refuse the petitioner's prayer or make such other order as may be just.

It therefore follows that after the issue of a warning and the entry of appearance the matter is deemed to be contested and the court is obliged to dispose of it summarily or direct that it proceed as a contentious probate proceeding under O. 72. This means that at that stage the court must be seised of all the relevant facts. In fact the warning requires the caveator to give particulars of his interest in the appearance. Compliance with this requirement as mandated by O. 71 r. 37(8) would ensure that sufficient material is placed before the court in order to enable it to act under Or. 71 r. 38. However, the appearance entered by the caveator does not give the required particulars so as to enable the court to act as it should as he has merely filled in the particulars as required by Form 175. In my opinion the caveator cannot be seriously faulted for failure to give the particulars as he was merely complying with Form 175 which I have reproduced earlier. A sight at the equivalent English Form shows that our Form 175 may require to be modified. I reproduce the English Form.

42. Appearance to warning or citation

(NCPR 44(10), 46(6))

In the High Court of Justice
Family Division
The Principal (*or* District Probate) Registry
Caveat No. dated the day of 19
(Citation dated the day of 19 .)
Full name and address of deceased:
Full name and address of person warning (or citor):
(*Here set out the interest of the person warning, or citor, as shown in warning or citation*).
Full name and address of caveator (or person cited).
(*Here set out the interest of the caveator or person cited, stating date of the will (if any) under which such interest arises*.)
Enter an appearance for the above-named caveator (*or* person cited) in this matter.
Dated the day of 19
(*Signed*)
whose address for service is: Solicitor (*or* 'In person').
(NCPR 1987, *Form 5*).

In my opinion, therefore, Form 175 must be varied as authorised by O. 1 r. 7 to incorporate the requirements of O. 71 r. 37(10). I then adjourned the case to 5 January 1998 to enable the caveator to re-file his appearance incorporating the required particulars.

When the case was called up on 5 January 1998 a fresh appearance had been filed. It reads as follows:

KEHADIRAN DALAM AMARAN ATAU SITASI

Kaveat dibawah Probet No. 32-8-1997 bertarikh 12 haribulan Jun 1997.

Nama dan alamat penuh si mati: YEOW CHOW BENG di No. 3-A, Taman Kota Laksamana 1/9, 75200 Melaka.

Nama dan alamat penuh orang yang memberi amaran: YE SIE ENG di No 3-A, Taman Kota Laksamana, Section I, Jalan Kota Laksamana 1/9, 75200 Melaka dan YEOW HOON SIONG di No 417-H, Nam Seng Garden, Jalan Bachang, 75300 Melaka.

Kepentingan pihak-pihak yang memberi amaran iaitu Ye Sie Eng dan Yeow Hoon Siong adalah sebagai wasi dan pemegang amanah yang dinamakan didalam wasiat si mati bertarikh 24hb April 1995.

Nama dan alamat penuh pengkaveat YEOW HO HUAT di 103 Jalan Tun Tan Cheng Lock, 75200 Melaka.

Kepentingan pengkaveat Yeow Ho Huat adalah sebagai seorang wasi dan pemegang amanah yang dinamakan didalam wasiat dan testamen akhir simati yang bertarikh 10hb September 1995.

Masukkan kehadiran untuk pengkaveat yang dinamakan di atas dalam perkara ini.

The appearance discloses that the caveator has in his possession a will dated later in time than that of the petitioners for probate. I was of the opinion that the matter cannot be disposed of summarily as the validity of the will of the petitioners for probate can only be determined in a probate action. Accordingly, I directed that the provisions of O. 72 shall apply. The probate action is to be commenced by the petitioners as they are the persons applying for probate.